ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE JANIS L. SAMMARTINO**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08cr2032-JLS DATE: August 21, 2008 TIME: 9:00 a.m. NOTICE OF MOTIONS: (1) TO COMPEL DISCOVERY; (2) TO PRESERVE EVIDENCE; (3) TO SUPPRESS EVIDENCE UNDER THE FOURTH AMENDMENT (4) TO SUPPRESS STATEMENTS UNDER THE FIFTH AMENDMENT; (5) TO SEVER COUNTS; (6) TO DISMISS THE INDICTMENT DUE TO MISINSTRUCTION (7) TO PRODUCE GRAND JURY INSTRUCTIONS; AND, (8) FOR LEAVE TO FILE FURTHER MOTIONS.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY,
CHARLOTTE KAISER, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on August 21, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard, the defendant, Jose Gastelum, by and through his counsel, Robert Rexrode, will ask this Court to enter an order granting the following motions.

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MOTIONS

The defendant, Jose Gastelum, by and through his attorney, Robert Rexrode, pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order:

1) to compel discovery;
2) to preserve evidence;
3) to suppress evidence under the Fourth Amendment;
4) to suppress statements under the Fifth Amendment;
5) to sever counts;
6) to dismiss the indictment due to misinstruction;
7) to produce grand jury transcripts; and,
8) granting leave to file further motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and all other materials that may come to this Court's attention at the time of the hearing on these motion.

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: August 10, 2008

ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
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Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE JANIS L. SAMMARTINO**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	)	CASE NO. 08cr2032-JLS STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS.

I.

FACTUAL HISTORY[1]

1. Overview of Case & Charges

Agents arrested Mr. Gastelum on June 5, 2008. They did so after using a spike-strip (euphemistically described by agents as a Controlled Tire Deflation Device) to puncture the tires of a car allegedly driven by Mr. Gastelum. Once agents stopped the car, they discovered six undocumented immigrants. Agents chose to retain three of these immigrants. At the request of Mr. Gastelum, the government retained a fourth immigrant from the car. Agents then sent the remaining two immigrants back to Mexico.

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[1]The following facts are based on information provided by the government. Mr. Gastelum does not admit their accuracy and reserves the right to challenge them.

The government has charged Mr. Gastelum, via indictment, with eight counts of violating 8 U.S.C. § 1324. Four of those charges allege that Mr. Gastelum "transported" four illegal immigrants, in violation of 8 U.S.C. § 1324 (a)(1)(A)(ii) and (v)(II).

The four other charges allege that Mr. Gastelum "brought" four illegal immigrants to the United States, in violation of 8 U.S.C. § 1324 (a)(2)(B)(ii). For these four "bring-to" counts, the government alleged, under 18 U.S.C. § 2, that Mr. Gastelum aided and abetted in the violation of the substantive counts.

The government has also inserted, into its indictment, an "allegation" that Mr. Gastelum committed "the offenses charged in Counts 1 thru 8 while he was on pretrial release for felony charges in Criminal Case No. 07CR3318-JLS, and therefore is subject to an enhanced penalty of not more than one year[,]" under 18 U.S.C. § 3147.

2. Events Leading to Arrest

According to information provided by the government, the events leading to Mr. Gastelum's arrest began about 7:11 a.m. on June 5, 2008. At that time, agents patrolling the area around Calexico, California, received a call from security agents at the Calexico Port of Entry that six people had gotten into a white sedan. These six people had gotten into the car in an area in the United States, near the border with Mexico.

A border patrol agent, Jay Catalioto, spotted a white sedan with several people in it, and began to follow the car. Following the car onto Interstate 8, Agent Catalioto conferred with other agents over the radio, and coordinated the setting-up of a Controlled Tire Deflation Device (CTDD), otherwise known as a spike-strip.

About ten minutes after first receiving the call regarding the people getting into the car, agents threw the spike-strip across Interstate 8. According to Agent Catalioto, he turned on his car's emergency lights and sirens before another agent threw the spike-strip. After the car drove over the spike-strip, the car's tires went flat and the car out of control.

3. Post-Arrest Statement by Mr. Gastelum

Following his arrest, Mr. Gastelum made inculpatory statements in response to questioning by agents. Agents documented some of their exchange with Mr. Gastelum on videotape. This video begins about an hour after Mr. Gastelum's arrest. On the video, a supervising agent, Nelson Antiles, begins by advising Mr. Gastelum of his rights under *Miranda*. Mr. Gastelum asks to speak with an attorney and agents turn off the videotape. About two minutes later, the video is turned back on, and Agent Antiles asks Mr. Gastelum if he "voluntarily" wants to speak with agents. Mr. Gastelum says he does, and Agent Antiles then interrogates Mr. Gastelum for about twenty minutes. During this interrogation, Mr. Gastelum gives a series of inculpatory statements, but also tells agents that he had been forced into driving the car that day.

4. The Material Witnesses

Agents chose to retain three of the immigrants involved in this case. At the request of Mr. Gastelum, the government retained a fourth immigrant from the car. Agents then sent the remaining two immigrants back to Mexico.

a. those retained by the government

Of the four immigrants retained in this case, Agents spoke to all four. None of these people recall hearing sirens or seeing emergency lights before the car rolled over the spike-strip. When interviewed by agents on the day of their detention, all four of these people told the agents that the person who guided them across the border stayed in Mexico and that no guide had crossed the border with them. Months later, in an interview with agents in late September, one of the immigrants changed her story. This immigrant now claims that a foot-guide accompanied them across the border and was in the car with them. During this September interview, this immigrant purportedly identified the foot-guide from a photographic display.

b. those returned to Mexico

The agents in this case returned two of the immigrants involved back to Mexico before defense counsel had an opportunity to interview them. According to information provided by the government, the: "male subject was processed for reinstatement of deportation. The other remaining smuggled (sic) did not make any exculpatory statements concerning the driver."

5. Indictment

The government secured it indictment against Mr. Gastelum from the January 2007 Grand Jury, which received its initial instructions from District Judge Larry A. Burns.

II.

MOTION COMPEL DISCOVERY[2]

Mr. Gastelum requests the following discovery. His request is not limited to those items that the prosecutor knows of. It includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies." *See United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989).

(1) Brady Information. The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Under *Brady v. Maryland*, 373 U.S. 83 (1963), impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the accused. *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

(2) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar acts under Fed. R. Crim. P. 16(a)(1) and Fed. R. Evid. 404(b) and any prior convictions which would be used to impeach as noted in Fed. R. Crim. P. 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests notice two weeks before trial to give the defense time to investigate and prepare for trial.

(3) Request for Preservation of Evidence. The defendant requests the preservation of all physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case. This request includes, but is not limited to, the results of any fingerprint analysis, the defendant's personal effects, and any evidence seized from the defendant or any third party.

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[2]Mr. Gastelum has previously filed a motion to compel discovery in this case. He did so on June 13, 2008, under the then-numbered magistrate case, 08mj8509. Even though some of this earlier motion is now moot, due to discovery provided by the government, Mr. Gastelum nonetheless incorporates the previously filed motion by reference in order to preserve any appellate issues, should they arise. The earlier filed motion is attached as Exhibit A..

(4) Defendant's Statements. The defendant requests disclosure and production of all statements made by the defendant. This request includes, but is not limited to, the substance of any oral statement made by the defendant, Fed. R. Crim. P. 16(a)(1)(A), and any written or recorded statement made by the defendant. Fed. R. Crim. P. 16(a)(1)(B)(i)-(iii).

(5) Tangible Objects. The defendant seeks to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, alleged narcotics, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E).

(6) Expert Witnesses. The defendant requests the name, qualifications, and a written summary of the testimony of any person that the government intends to call as an expert witness during its case in chief. Fed. R. Crim. P. 16(a)(1)(G).

(7) Witness Addresses. The defendant requests access to the government's witnesses. Thus, counsel requests a witness list and contact phone numbers for each prospective government witness. Counsel also requests the names and contact numbers for witnesses to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as government witnesses.

(8) Jencks Act Material. Mr. Gastelum requests production in advance of trial of material discoverable under the Jencks Act, 18 U.S.C. § 3500. Advance production will avoid needless delays at pretrial hearings and at trial. This request includes any "rough" notes taken by the agents in this case. This request also includes production of transcripts of the testimony of any witness before the grand jury. *See* 18 U.S.C. § 3500(e)(1)-(3).

(9) Informants and Cooperating Witnesses. Mr. Gastelum requests disclosure of the name(s), address(es), and location(s) of all informants or cooperating witnesses used or to be used in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against Mr. Gastelum. *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from informants which exculpates or tends to exculpate Mr. Gastelum. *Brady v. Maryland*, 373 U.S. 83 (1963). The

government must disclose any information indicating bias on the part of any informant or cooperating witness. *Id.*

(10) **Specific Discovery Requests**

a. request for "tecs."

Mr. Gastelum requests production of any "tecs" related to the car he was arrested in, or any such "tec" searches run. This information is discoverable under *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999). Alternatively, it is discoverable under Fed. R. Crim. P. 16 (1)(E)(i).

b. request to view the car.

Mr. Gastelum requests access to the car in which he was arrested. *See* Fed. R. Crim. P. 16 (1)(E)(I).

c. identities and contact information of those in the car

Mr. Gastelum requests disclosure of the identities and contact information of the two undocumented immigrants involved in this case who were returned by agents to Mexico. These people are percipient witnesses to the alleged crime committed by Mr. Gastelum and their identities are thus discoverable. *See, e.g.*, *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). Defense counsel also has a good-faith belief that their observations may be material to the preparation of Mr. Gastelum's defense, and thus any documents or data related to these individuals are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Additionally, the government has an affirmative duty to disclose information which exculpates or tends to exculpate Mr. Gastelum. *Brady v. Maryland*, 373 U.S. 83 (1963). And last, as a matter of simple fairness and due process, the government should disclose those people are witnesses to the events that led to Mr. Gastlum's arrest, particularly when Mr. Gastelum does not have the ability to ascertain the identities or location of these witnesses.

d. reports concerning those immigrants returned to Mexico

The agents in this case returned two of the immigrants involved back to Mexico before defense counsel had an opportunity to interview them. According to information provided by the government, the: "male subject was processed for reinstatement of deportation. The other remaining smuggled (sic) did not make any exculpatory statements concerning the driver." Mr. Gastelum requests production of any reports—whether formal or inputted into the immigration service's computer system—concerning the interviews conducted of these two people. To the degree statements made by these two support Mr. Gastelum's Fourth Amendment motion, and to the degree statements made by these two support Mr. Gastelum's theory that the government must rely on an aiding and abetting theory to prosecute four of the counts in the indictment, this material is exculpatory, material, and thus discoverable. *See* Fed. R. Crim. P. 16 (1)(E)(I); *Brady*, 373 U.S. 83; *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

e. information concerning the September interview

When interviewed by agents on the day of their detention, all four of the retained immigrants told the agents that the person who guided them across the border stayed in Mexico and that no guide had crossed the border with them. Months later, in an interview with agents in late September, one of the immigrants changed her story. This immigrant now claims that a foot-guide accompanied them across the border and was in the car with them. During this September interview, this immigrant purportedly identified the foot-guide from a photographic display. Mr. Gastelum requests discovery regarding this September interview—including the circumstances surrounding how this interview came to pass and the circumstances surrounding the immigrant's putative identification of the foot-guide who purportedly came into the United States. This information is material, and thus discoverable, for three reasons: 1) it will go toward whether the government must rely on an aiding and abetting theory for four of the counts in the indictment; 2) it will go towards the potential impeachment of this immigrant; and 3) it may provide a basis for suppression of the identification on due process grounds as unduly suggestive. *See* Fed. R. Crim. P. 16 (1)(E)(I); *Brady*, 373 U.S. 83; *Bagley*, 473 U.S. 667; *Agurs*, 427 U.S. 97.

f. *Gigilio/Henthorn* material

Mr. Gastelum specifically requests that the Assistant United States Attorney assigned to this case oversee a review of all personnel files of each agent involved in the present case for impeachment material. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); *but see United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996).

Mr. Gastelum requests this review, and production of any such material, sufficiently in advance of the motion-hearing date to be useful at the anticipated evidentiary hearing.

(11) Residual Request. Mr. Gastelum intends by this discovery motion to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States.

III.

MOTION TO PRESERVE EVIDENCE[3]

1. Car Allegedly Driven by Mr. Gastelum

Mr. Gastelum requests the government preserve the car allegedly driven by Mr. Gastelum in this case. *See* Fed. R. Crim. P. (a)(1)(E)(i).

2. Law Enforcement Communications Related to the Arrest

The government has disclosed an audio compact-disc of communications between agents on the day of Mr. Gastelum's arrest. From this compact-disc, it appears that agents communicated electronically with each other by means ***other than*** the communications memorialized on this compact-disc. Mr. Gastelum thus requests preservation of ***all*** recorded communications between agents as they relate to Mr. Gastelum's arrest on June 5, 2008. Defense counsel has a good-faith belief that these communications may be material to the preparation of Mr. Gastelum's defense, and thus are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i).

IV.

MOTION TO SUPPRESS EVIDENCE UNDER THE FOURTH AMENDMENT

A. Introduction

Government agents seized Mr. Gastelum in violation of the Fourth Amendment. Agents lacked reasonable suspicion to seize Mr. Gastelum, they lacked probable cause to seize Mr. Gastelum, and they used excessive force when seizing Mr. Gastelum. For these reasons,

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[3]Mr. Gastelum has previously filed a motion to preserve evidence in this case. He did so on June 13, 2008, under the then-numbered magistrate case, 08mj8509. Even though some of this earlier motion is now moot, due to discovery provided by the government, Mr. Gastelum nonetheless incorporates the previously filed motion by reference in order to preserve any appellate issues, should they arise. The earlier filed motion is attached as Exhibit A..

Mr. Gastelum moves to suppress all physical evidence discovered as a result of his unlawful seizure. Mr. Gastelum also moves, for the same reasons, to suppress any statements made by him following his unlawful seizure.

B. The government bears the burden of justifying this warrantless seizure

Agents seized Mr. Gastelum without a warrant. That seizure is therefore presumptively unreasonable. *See United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001). It is the government's burden to demonstrate that its agents complied with the Fourth Amendment. *See id.*

C. Agents lacked reasonable suspicion

Although, as discussed below, Mr. Gastelum's position is that agents needed (at a minium) probable cause to seize him in the manner they chose to do so, agents nonetheless lacked even reasonable suspicion to seize Mr. Gastelum. Because they lacked reasonable suspicion to seize Mr. Gastelum, agents violated the Fourth Amendment when seizing Mr. Gastelum.

The Fourth Amendment proscribes "unreasonable searches and seizures." U.S. Const., amend IV. Temporary detention of individuals during the stop of an automobile, even if only for a brief period and for a limited purpose, constitutes a "seizure" within the meaning of the Fourth Amendment, and must be supported by at least reasonable suspicion. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). Reasonable suspicion requires that the agent making the stop be "aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc).

The Fourth Amendment protection from unreasonable searches and seizures applies to persons in moving vehicles. *See United States v. Cortez*, 449 U.S. 411, 417 (1981). These protections also apply to persons driving near the United States' border with Mexico. Roving border patrol agents must have reasonable suspicion, based on specific and articulable facts, in order to initiate a stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1445 (1994). "Reasonable suspicion requires that the specific facts and inferences create suspicion 'that the particular person detained is engaged in criminal activity.'" *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1493 (9th Cir. 1994).

In assessing reasonable suspicion, this Court looks to the "'totality of the circumstances' of each case," keeping in mind that "an officer's reliance on a mere 'hunch' is insufficient to justify a stop." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). It is well-settled that factors that describe too many legitimate individuals do not create reasonable suspicion. *Sigmond-Ballesteros*, 285 F.3d 1117; *Salinas*, 940 F.2d 392 (9th Cir. 1991); *Hernandez-Alvarado*, 891 F.2d 1414 (9th Cir. 1989). *See also Rodriguez-Sanchez*, 23 F.3d at 1492 (reasonable suspicion may not be "based on broad profiles which cast suspicion on entire categories of people without any individual suspicion of the particular person to be stopped"), *overruled in part on other grounds by Montero-Camargo*, 208 F.3d at 1131-32. When viewed in their totality, the factors undergirding the agents' stop of Mr. Gastelum are constitutionally deficient.

The "totality of the circumstances" in this case includes the following: 1) Agents had a report that six people got into a car near the border; 2) agents saw a car matching the one reported; 3) an agent saw people in that car and what the agent believed was the driver speaking with them. These circumstances do not add up to reasonable suspicion to seize a person. Allowing a seizure under these circumstances would allow for officers to sweep too many people into an investigative net. On the day agents seized Mr. Gastelum, he was driving on paved roadways near a busy Port of Entry. He lawfully entered a major interstate thoroughfare—Interstate 8. Mr. Gastelum's actions that day mirror those of any person driving in the area. Even when viewed in their totality, those factors present here describe far too many legitimate individuals to support a "reasonable suspicion." *United States v. Rodriguez*, 976 F.2d 592, 595-96 (9th Cir. 1992); *United States v. Salinas*, 940 F.2d 392, 393-95 (9th Cir. 1991); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418 (9th Cir. 1989).

D. Agents lacked probable cause

Even assuming for the sake of argument that agents had reasonable suspicion to seize Mr. Gastelum, the manner in which agents chose to seize Mr. Gastelum warranted at least a level of suspicion of at least probable cause. As agents lacked probable cause to arrest Mr. Gastelum, they violated the Fourth Amendment.

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As the Ninth Circuit has observed, "[t]he line between an arrest without probable cause and an investigatory stop based on founded suspicion is blurred and often difficult to determine[.]" *United States v. Beck*, 598 F.2d 497, 500 (9th Cir. 1979). Although "a suspicious individual may be briefly stopped and detained for purposes of limited inquiry . . . . the dimensions of an encounter between the individual and officer may be sufficiently constrictive to cause the average person, innocent of crime, to reasonably think he was being arrested." *Id.* (footnote omitted). In determining whether an arrest has occurred, "a significant consideration is the extent that freedom of movement is curtailed." *Id.* at 500-01 (citing *Sibron v. New York*, 392 U.S. 40, 67 (1968)). "The other critical consideration is the degree and manner of force used in the stop and detention." *Id.* at 501.

Agents clearly arrested Mr. Gastelum when the spike-strip they laid in front of the car he was driving violently brought the car to a stop. At the moment the car ran over the spike-strip, Mr. Gastelum's freedom of movement was seriously curtailed. Indeed, for a moment, Mr. Gastelum completely lost control of his freedom of movement. Suddenly, unexpectantly and without warning, Mr. Gastelum went from driving down a major interstate on four good tires to having the car's tires taken out from underneath him. After coming to rest off the interstate, Mr. Gastelum's freedom of movement had changed dramatically. No longer could he drive on his way. Had agents not found anything incriminating in the car, Mr. Gastelum would have been stuck on Interstate 8, miles from a garage that might be able to repair the damage wrought by the agents. This type of seizure, almost by definition, will always constitute an abridgement of movement more similar to an arrest than an investigatory stop. *Cf. Florida v. Royer*, 460 U.S. 491, 503 (1983) (fact that agents had control of an airline passenger's luggage and ticket eviscerated consensual nature of earlier encounter between the passenger and agents, contributed to passenger being, "[a]s a practical matter [] under arrest"); *United States v. Place*, 462 U.S. 696, 708-08 (1983) ("The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. . . . Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return."). A reasonable person, having had federal agents seriously damage their car on a major interstate, would have reasonably believed he or she had been arrested by those agents. *Cf. id.* At a minimum, under these circumstances, a reasonable person engaged in no illegality would not have felt free to leave once he or she had answered the agent's initial questions—the damage done to the car made that impossible. *See United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (2001) ("An officer must initially restrict the questions he asks during a stop to those that are reasonably related to the justification for the stop."); *see also Place*, 462 U.S. at 708-08.

By violently stopping Mr. Gastelum, agents effectuated an arrest. As agents arrested Mr. Gastelum when they spike-stripped the car he was driving, the question becomes whether that arrest was reasonable within the meaning of the Fourth Amendment. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). Whether an arrest is "constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Id.* For those reasons discussed above in the section discussing whether the agents had reasonable suspicion to seize Mr. Gastelum, circumstances known to agents when they arrested Mr. Gastelum were insufficient to support a finding of probable cause. His arrest consequently violated the Fourth Amendment. *See United States v. Beck*, 598 F.2d at 502.

E. Agents used excessive force

Even assuming for the sake of argument that agents had probable cause to seize Mr. Gastelum, agents used excessive force in seizing Mr. Gastelum. In doing so, agents violated the Fourth Amendment when seizing Mr. Gastelum.

Where "excessive force claims arise[] in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . . ." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The "'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395 (emphasis in original) (citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Connor*, 490 U.S. at 396. This, in turn, depends upon "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*; *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006).

In seizing Mr. Gastelum, agents used excessive force. Without gainsaying the government's interest in interdicting drug and immigrant smugglers, the nature of a spike-strip's intrusion on an individual's right to travel is considerable. Not merely an inconvenience, as opposed to a traffic stop, falling victim to a spike-strip entails serious consequences. There is the potential for serious injury. More mundanely, there is the cost and inconvenience of replacing damaged tires. There is also the elongated seizure inherent in a method of detaining a person by destroying the tires of his or her car. When agents use a spike-strip to seize someone, the intrusion visited on that person far exceeds that associated with a traffic stop.

Nor do the particular facts of Mr. Gastelum's case warrant such a use of force. Without a clear idea of what they were dealing with, the agents here cannot have made a reasoned decision that the severity of the crime warranted such a use of force. Nor did Mr. Gastelum pose an immediate threat to officers. Whether an individual poses an "*immediate threat* to the safety of the officers or others" is a relevant consideration when an agent decides to use force. *Connor*, 490 U.S. at 396 (emphasis added). Here, however, the agents had no reason to believe that Mr. Gastelum posed an immediate threat to anyone. He did not flee from officers. He did not know they were there. Even crediting the incredible—that Agent Catalioto activated his emergency light and sirens before the spike-strip was deployed—an interval of mere seconds does not constitute a "flight" from officers that justifies the use of such a dangerous tactic. Under these circumstances, agents used an unreasonable amount of force. In doing so, they violated the Fourth Amendment.

F. Relief Sought

1. Suppression

Mr. Gastelum requests that all physical evidence discovered following his seizure be suppressed. Evidence obtained in violation of the Fourth Amendment cannot be used in criminal proceedings. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

Mr. Gastelum also requests that any statements made by him following his illegal seizure be suppressed. Statements obtained as a result of a Fourth Amendment violation must be suppressed. *United States v. Johnson*, 626 F.2d 753, 759 (9th Cir. 1980). They are suppressible regardless of whether they are "voluntary" for Fifth Amendment purposes, and regardless of whether *Miranda* warnings preceded them. *Id.* at 757-58. To vindicate Fourth Amendment interests, if a statement is causally connected to a Fourth Amendment violation it must be suppressed. *Id.*

In determining if a statement is causally connected to a Fourth Amendment violation, courts look to three factors: (1) the "temporal proximity" between the violation and the statement; (2) the presence of any intervening circumstances; and (3) "the purpose and flagrancy of the official misconduct." *Johnson*, 626 F.2d at 758. Mr. Gastelum's statements are causally related to his illegal seizure. They occurred about an hour after Mr. Gastelum was illegally seized. Mr. Gastelum was in continuous custody during that time period. There were thus no intervening circumstances that would break the causal connection between the illegal arrest of Mr. Gastelum and his statements. As for the third factor, "the purpose and flagrancy of the official misconduct," it is relevant only in relation to how it motivates the defendant. *See id.* at 758. That is, the third factor only serves to inform a finding of casual connection between the illegality and the statement. Flagrant misconduct is not required for suppression. *See id.* at 759 (suppressing statement on the basis of the first two factors alone). Nonetheless, the agents' conduct here was flagrant. Without sufficient warning or sufficient cause, they violently stopped the car driven by Mr. Gastelum.

V.

MOTION TO SUPPRESS STATEMENTS UNDER THE FIFTH AMENDMENT

A. Introduction

Following his arrest, Mr. Gastelum made inculpatory statements in response to questioning by agents. During this interrogation, Mr. Gastelum gives a series of inculpatory statements, but also tells agents that he had been forced into driving the car that day. Nr. Gastelum moves to suppress these statements on two grounds: the agents' violation of *Miranda* and an inadequate showing that Mr. Gastelum's statements were voluntarily made.

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B. Violation of Miranda

In order for any statements made by Mr. Gastelum to be admissible against him, the government must demonstrate that they were obtained in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). . The government must establish that Mr. Gastelum' waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). When interrogation continues without the presence of an attorney, and a statement results, the government has a heavy burden to demonstrate that the defendant has intelligently and voluntarily waived his privilege against self-incrimination. *Miranda*, 384 U.S. at 475. The court must indulge every reasonable presumption against waiver of fundamental constitutional rights, so the burden on the government is great. *United States v. Heldt*, 745 F. 2d 1275, 1277 (9th Cir. 1984).

There should be no dispute that Mr. Gastelum invoked his right to counsel under *Miranda*. Agents documented some of their interrogation with Mr. Gastelum on videotape. On the video, a supervising agent, Nelson Antiles, begins by advising Mr. Gastelum of his rights under *Miranda*. Mr. Gastelum asks to speak with an attorney and agents turn off the videotape.

According to discovery provided by the government, however, agents state that Mr. Gastelum "began to speak freely" about his case after requesting an attorney. After this, about two minutes later, the video is turned back on, and Agent Antiles asks Mr. Gastelum if he "voluntarily" wants to speak with agents. Mr. Gastelum says he does, and Agent Antiles then interrogates Mr. Gastelum for about twenty minutes. Mr. Gastelum assumes the government will argue that Mr. Gastelum "re-initiated" a conversation after he invoked his right to counsel.

"[W]hen an accused has invoked his right to counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Once a person has "expressed his desire to deal with police only through counsel, [he] is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id* at 484-85.

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This rule, know as the *Edwards* rule, is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *United States v. Michaud*, 268 F.3d 728, 737 (9th Cir. 2001) (bracket in original quote omitted to restore male gender to sentence) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). In short, "if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

The government has not met its burden to demonstrate that Mr. Gastelum initiated further questioning by agents. Nor has the government met its burden that Mr. Gastelum knowingly and intelligently waived his previously invoked right to counsel. Although Mr. Gastelum's invocation of his right to counsel is on video, the two minutes within which agents say he "began to speak freely" are curiously missing from the videotape. An agent's cursory statement about what occurred when the videotape was not running is insufficient to meet the government's burden to demonstrate that Mr. Gastelum validly waived his rights under *Miranda*.

C. Voluntariness of Statement

Even if this Court determines that Mr. Gastelum validly waived his *Miranda* rights, it must still make a determination that any statements made were voluntary. Under 18 U.S.C. § 3501(a), this Court is required to determine, whether any statements made by Mr. Gastelum were voluntary. In addition, section 3501(b) requires this Court to consider various enumerated factors, including whether Mr. Gastelum understood the nature of the charges against him and whether he understood his rights. Without such evidence, this Court cannot adequately consider these statutorily mandated factors. Moreover, section 3501(a) requires this Court to make a factual determination. Where a factual determination is required, Fed. R. Crim. P. 12 obligates courts to make factual findings. *See United States v. Prieto-Villa*, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" *id.* at 610 (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading.

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VI.

MOTION TO SEVER COUNTS

A. Introduction

The Grand Jury returned an eight-count indictment against Mr. Gastelum. Four of those charges allege that Mr. Gastelum "transported" four illegal immigrants, in violation of 8 U.S.C. § 1324 (a)(1)(A)(ii) and (v)(II). The four other charges allege that Mr. Gastelum "brought" four illegal immigrants to the United States, in violation of 8 U.S.C. § 1324 (a)(2)(B)(ii). For these four "bring-to" counts, the government alleged, under 18 U.S.C. § 2, that Mr. Gastelum aided and abetted in the violation of the substantive counts. Mr.Gastelum moves to sever these groups of four from each other. The basis for this severance is the impracticability of instructing the jury, and having the jury be able to follow the Court's instructions, on a duress defense.

B. Legal Standard For Severance

The government may charge Mr. Gastelum with multiple counts if those counts "are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). Because the Grand Jury alleged that Mr. Gastelum committed all counts at roughly the same time, the eight counts alleged by the Grand Jury against Mr. Gastelum appear to meet this standard. Nonetheless, even when counts are properly joined under Federal Rule of Criminal Procedure 8(a), severance may still be available under Federal Rule of Criminal Procedure 14(a). *See United States v. Lewis*, 787 F.2d 1318, 1320-21. Under Federal Rule of Criminal Procedure 14(a), a court may order severance if "joinder of offenses . . . appears to prejudice a defendant or the government . . . ." Fed. R. Crim. P. 14(a). It would do so here.

C. Varying Burdens in Duress Cases

As the government is aware, it is likely that the defense of duress will be at issue should this case go to trial. Mr. Gastelum contends that depending on the charge, either the transportation charges or the aiding and abetting charges—different parties will have to carry the burden on whether Mr. Gastelum acted under duress.

Until January 2007, the Ninth Circuit had two very different jury instructions relevant to a duress defense. *See* Ninth Circuit Model Jury Instruction ("Model Jury Instruction") No. 6.5 (West

2003); Model Jury Instruction No. 6.6 (West 2003); *see also United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (1991); *id*. at n.3; *United States v. Meraz-Soloman*, 3 F.3d 298, 299-300 (9th Cir. 1993). These two jury instructions allocated the burden of proof on the issue of duress based on the nature of the crime charged. For example, where a "defense of duress does not involve refutation of any of the elements of the offense . . . it is proper to place the burden of proving that defense by a preponderance of the evidence on the defendant." *Dominguez-Mestas*, 929 F.2d 1379. Model Jury Instruction 6.6 expressed this rule of law and was used to charge juries on duress where "the offense charged does not have a mens rea element[.]" See Model Jury Instruction No. 6.6 (West 2003) (text and comment). However, when the offense charged had a *mens rea* element and duress is raised to rebut this element, the government must "prove the absence of duress beyond a reasonable doubt[.]" Model Jury Instruction No. 6.5 (West 2003) (text and comment) (citing *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1381 (9th Cir. 1991)). In other words, depending on the nature of the charge against a defendant, either the defendant or the government may bear the burden of proving, or disapproving, the existence of duress.

Complicating this state of affairs, some Ninth Circuit Model Jury Instructions were changed in January 2007. One of those changed at that time was the duress instruction relevant to where a duress defense refuted an element of the offense. *See* Model Jury Instruction No. 6.5 (2008), *available at* http://207.41.19.15/web/sdocuments.nsf/crim, last visited Aug. 6, 2008. In this change, the committee which writes the model instructions shifted the burden on the issue of duress from the government to the defendant. *Id*. The committee did so on the basis of an intervening Supreme Court case. *Id*. (at first comment). As the committee put it: "In *Dixon v. United States*, 126 S. Ct. 2437 (2006), the Supreme Court decided the burden of proof announced in this instruction, changing what had previously been the law in the Ninth Circuit." *Id*. Problem is, *Dixon* did no such thing.

In *Dixon*, the Supreme Court addressed which party should bear the burden on the issue of duress in the context of a statute that required only two mental states: that the defendant had knowledge of the facts that constituted the offense, and knowledge that her actions were illegal. 126 S. Ct. at 2241. That is all the Court decided. The Court explicitly stated that it was *not* holding that a defendant must bear the burden on a duress defense for all crimes. *Id*. ("existence of duress normally does not controvert any elements of the offense itself"); *see also id*. at 2242, n.4. Indeed, in summing up the scope of its holding, the Court stated:

> In light of Congress' silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress "may have contemplated" it in *an offense-specific* context. In the context of the firearms offenses at issue—as will normally be the case, given the long established common-law rule—we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence.

Id. at 2247-48 (emphasis added) (citation omitted). That is all *Dixon* held. In deciding that this one case overturned decades of Ninth Circuit precedent, the committee that writes the model instructions got it wrong. This is not terribly surprising. *Cf. United States v. Hedgwood*, 977 F.2d 492, 496 (9th Cir. 1992) ("Had the district court merely read the model jury instruction, it would have committed plain error"). As discussed below, under Ninth Circuit law, the government properly bears the burden on the issue of duress for those counts that charge Mr. Gastelum with aiding and abetting the bringing in of the immigrants.

D. Application of Different Burdens to Mr. Gastelum's Case

1. The Transportation Charges

Under Ninth Circuit law, Mr. Gastelum will bear the burden on the issue of duress for those charges involving the transportation of the immigrants. *United States v. Hernandez-Franco*, 189 F.3d 1151, 1157-58 (9th Cir. 1999). For those charges involving aiding and abetting, however, the government bears the burden.

2. The Aiding and Abetting Charges

Aiding and abetting a crime requires proof that a person *desired* the substantive offense to take place. Acting under duress necessarily negates this *subjective desire* that the substantive offense take place. It is for this reason that the government must bear the burden on whether Mr. Gastelum aided and abetted others in bringing people to the United States.

Under Ninth Circuit law, "if a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of proof on the defendant." *Hernandez-Franco*, 189 F.3d at 1157 (internal quotation marks omitted). What this boils down to is "whether proof of duress necessarily entails disproof of the mens rea required for a violation" of the statute charged. *Id.* at 1158 (internal quotation marks omitted). In turn, "[c]onviction as an aider and abettor *requires* proof the defendant willingly associated himself with the venture and participated therein as something he wished to bring about." *United States v. Lopez*, 484 F.3d 1186, 1199 (9th Cir. 2007) (en banc) (emphasis added, brackets in original). Conviction as an aider and abettor requires the government to prove that a person "command[ed], counsel[ed] or otherwise *encourage*[*d*] [a] perpetrator to commit the crime." *Id.* (brackets added, emphasis in original). In other words, to sustain a conviction of an aider and abettor, the government must prove that a defendant actively sought out and *wanted* the substantive offense to take place.

Needless to say, a person acting under duress is not voluntarily associating himself with a venture he seeks to succeed. By definition, a person acting because of a direct threat has been shanghaied, or pressed into, a venture not of his own making and not one that he desires, or wishes, to bring about. A person acting under duress may know what he is doing, and that what he is doing is against the law, (as was the case in *Dixon*, 126 S. Ct. 2437), but he cannot be said to be acting in a manner that expresses his voluntary desire to see the crime occur, or "as something he wished to bring about." *Lopez*, 484 F.3d at 1199. A person acting under duress participates in a crime because of the threat, not because he has *encouraged* others to act. *Id.* For this reason, "proof of duress necessarily entails disproof of the mens rea required" to sustain a conviction as an aider and abettor, and thus, the government bears the burden to disprove the existence of duress. *Hernandez-Franco*, 189 F.3d at 1157-58.

3. Need for Severance

In this case, *both* standards relevant to a duress defense will be at play. It is too much to ask of a jury to compartmentalize these conflicting burdens. Asking the jury to do so will promote confusion and runs the risk of prejudicing Mr. Gastelum. For this reason he requests this Court sever the transportation charges from those involving aiding and abetting.

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IV.

MOTION TO DISMISS THE INDICTMENT DUE TO MISINSTRUCTION

A. Introduction

The indictment in this case was returned by the January 2007 grand jury. That grand jury was instructed by the Honorable Larry A. Burns, United States District Court Judge on January 11, 2007. *See Reporter's Partial Transcript of the Proceedings*, dated January 11, 2007.[4] Judge Burns' instructions deviate from the instructions at issue in the major Ninth Circuit cases challenging a form grand jury instruction previously given in this district in several ways.[5]

After repeatedly emphasizing to the grand jurors that probable cause determination was their sole responsibility, *see* Ex. A at 3, 3-4, 5,[6] Judge Burns instructed the grand jurors that they were forbidden "from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity [as] criminal is not up to you." *See id.* at 8. The instructions go beyond that, however, and tell the grand jurors that, should "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of even though the evidence may be insufficient.'" *See id.* at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because the grand jurors disagree with a proposed prosecution.

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[4]The following motion has been litigated extensively in this district. District Judge Barry Ted Moskowitz entered a written decision on this motion in *United States v. Martinez-Covvarrubias*, No. 07cr0491-BTM. Given the size of the transcripts under consideration, and as both the government and the Court likely have these transcripts, Mr. Gastelum has **not** attached either of the two transcripts he cites. The first transcript referred to is the *Reporter's Partial Transcript of the Proceedings*, dated January 11, 2007. Mr. Gastelum refers to this transcript as "Exhibit A" throughout this motion. The second transcript cited to by Mr. Gastelum is the *Partially redacted, transcripts of the grand jury impanelment proceedings*. Ms. Gastelum refers to this transcript as "Exhibit B" throughout this motion. Mr. Gastelum is happy to provide a copy of these transcripts.

[5] *See, e.g.*, *United States v. Cortez-Rivera*, 454 F.3d 1038 (9th Cir. 2006); *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir.) (en banc), *cert. denied*, 126 S. Ct. 736 (2005) (*Navarro-Vargas II*); *United States v. Navarro-Vargas*, 367 F.3d 896 (9th Cir. 2004)(*Navarro-Vargas I*); *United States v. Marcucci*, 299 F.3d 1156 (9th Cir. 2002) (per curiam).

[6] *See also id.* at 20 ("You're all about probable cause.").

Immediately before limiting the grand jurors' powers in the way just described, Judge Burns referred to an instance in the grand juror selection process in which he excused three potential jurors. *See id.* at 8.

> I've gone over this with a couple of people. You understood from the questions and answers that a couple of people were excused, I think three in this case, because they could not adhere to the principle that I'm about to tell you.

Id. That "principle" was Judge Burns' discussion of the grand jurors' inability to give effect to their disagreement with Congress. *See id.* at 8-9. Thus, Judge Burns not only instructed the grand jurors on his view of their discretion; he enforced that view on pain of being excused from service as a grand juror.

For example, in one of his earliest substantive remarks, Judge Burns makes clear that the grand jury's sole function is probable cause determination.

> [T]he grand jury is determining really two factors: "do we have a reasonable belief that a crime was committed? And second, do we have a reasonable belief that the person that they propose that we indict committed the crime?"
> If the answer is "yes" to both of those, then the case should move forward. If the answer to either of the questions is "no," then the grand jury should not hesitate and not indict.

See Exhibit B at 8. In this passage, Judge Burns twice uses the term "should" in a context that makes clear that the term is employed to convey instruction: "should" cannot reasonably be read to mean optional when it addresses the obligation not to indict when the grand jury has no "reasonable belief that a crime was committed" or if it has no "reasonable belief that the person that they propose that we indict committed the crime."

Equally revealing are Judge Burns' interactions with two potential grand jurors who indicated that, in some unknown set of circumstances, they might decline to indict even where there was probable cause. Because of the redactions of the grand jurors' names, Ms. Martinez will refer to them by occupation. One is a retired clinical social worker (hereinafter CSW), and the other is a real estate agent (hereinafter REA). The CSW indicated a view that no drugs should be considered illegal and that some drug prosecutions were not an effective use of resources. *See id.* at 16. The CSW was also troubled by certain unspecified immigration cases. *See id.*

Judge Burns made no effort to determine what sorts of drug and immigration cases troubled the CSW. He never inquired as to whether the CSW was at all troubled by the sorts of cases actually filed in this district, such as drug smuggling cases and cases involving reentry after deportation and alien smuggling. Rather, he provided instructions suggesting that, in any event, any scruples LCW may have possessed were simply not capable of expression in the context of grand jury service.

> Now, the question is can you fairly evaluate [drug cases and immigration cases]? Just as the defendant is ultimately entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. *I wouldn't want you to say*, "well, yeah, there's probable cause, but I still don't like what our government is doing. I disagree with these laws, so I'm not going to vote for it to go forward." If that is your frame of mind, the probably you shouldn't serve. Only you can tell me that.

See id. at 16-17 (emphasis added). Thus, without any sort of context whatsoever, Judge Burns let the grand juror know that he would not want him or her to decline to indict in an individual case where the grand juror "[didn't] like what our government is doing," *see id.* at 17, but in which there was probable cause. *See id.* Such a case "should go forward." *See id.* Given that blanket proscription on grand juror discretion, made manifest by Judge Burns' use of the pronoun "I", the CSW indicated that it "would be difficult to support a charge even if [the CSW] thought the evidence warranted it." *See id.* Again, Judge Burns' question provided no context; he inquired regarding "a case," a term presumably just as applicable to possession of a small amount of medical marijuana as kilogram quantities of methamphetamine for distribution. Any grand juror listening to this exchange could only conclude that there was *no* case in which Judge Burns would permit them to vote "no bill" in the face of a showing probable cause.

Just in case there may have been a grand juror that did not understand his or her inability to exercise anything like prosecutorial discretion, Judge Burns drove the point home in his exchange with REA. REA first advised Judge Burns of a concern regarding the "disparity between state and federal law" regarding "medical marijuana." *See id.* at 24. Judge Burns first sought to address REA's concerns about medical marijuana by stating that grand jurors, like trial jurors, are simply forbidden from taking penalty considerations into account.

> Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress

> has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision of whether there was a probable cause. ...

Id. at 24-25. Having stated that REA was to "abide" by the instruction given to trial jurors, Judge Burns went on to suggest that REA recuse him or herself from medical marijuana cases. *See id.* at 25.

In response to further questioning, REA disclosed REA's belief "that drugs should be legal." *See id.* That disclosure prompted Judge Burns to begin a discussion that ultimately led to an instruction that a grand juror is obligated to vote to indict if there is probable cause.

> I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar obligation as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. You're prerogative instead is to act like a judge and say, "all right. This is what I've to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." *And then your obligation, if you find those to be true, would be to vote in favor of the case going forward.*

Id. at 26-27 (emphasis added). Thus, the grand juror's duty is to conduct a simple two part test, which, if both questions are answered in the affirmative, lead to an "obligation" to indict.

Having set forth the duty to indict, and being advised that REA was "uncomfortable" with that paradigm, Judge Burns then set about to ensure that there was no chance of a deviation from the obligation to indict in every case in which there was probable cause.

> The Court: do you think you'd be inclined to let people go in drug cases even though you were convinced there was probable cause they committed a drug offense?
> REA: It would depend on the case.
> The Court: Is there a chance that you would do that?
> REA: Yes.
> The Court: I appreciate your answers. I'll excuse you at this time.

Id. at 27. Two aspects of this exchange are crucial. First, REA plainly does not intend to act solely on his political belief in decriminalization -- whether he or she would indict "depend[s] on the case," *see id.*, as it should. Because REA's vote "depend[s] on the case," *see id.*, it is necessarily true that

REA would vote to indict in some (perhaps many or even nearly all) cases in which there was probable cause.[7] Again, Judge Burns made no effort to explore REA's views; he did not ascertain what sorts of cases would prompt REA to hesitate. The message is clear: it does not matter what type of case might prompt REA's reluctance to indict because, once the two part test is satisfied, the "obligation" is "to vote in favor of the case going forward." *See id.* at 27. That is why even the "chance," *see id.*, that a grand juror might not vote to indict was too great a risk to run.

In addition to his instructions on the authority to choose not to indict, Judge Burns also assured the grand jurors that prosecutors would present to them evidence that tended to undercut probable cause. *See id.* at 20.[8]

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you to say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.*

Id. (emphasis added).[9] The district court later returned to the notion of the prosecutors and their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

In the general instructions, Judge Burns posits a duty on the part of the prosecutor to present to the grand jurors evidence that tended to undercut probable cause. *See* Ex. A at 20.

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you to say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.

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[7] That fact belies the government's claim that Judge Burns excused only prospective jurors who "expressed inability to apply the laws passed by Congress." *See* Exhibit B at 8.

[8] These instructions were provided in the midst of several comments that praised the United States attorney's office and prosecutors in general.

[9] The "in most instances" language suggests that there may be some limit on this principle. Again, counsel has ordered the full transcript, and it will likely resolve the question posed in the instant footnote.

Id. The antecedent to this instruction is also found in the impanelment. After advising the grand jurors that "the presentation of evidence to the grand jury is necessarily one-sided," *see* Exhibit B at 14, Judge Burns gratuitously added that "[his] experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that." *See id.* Thus, Judge Burns unequivocally advised the grand jurors that the government would present any evidence that was "adverse" or "that cuts against the charge." *See id.*[10]

B. Argument

i. Navarro-Vargas Establishes Limits on the Ability of Judges to Constrain the Powers of the Grand Jury.

The Ninth Circuit has, over vigorous dissents, rejected challenges to various instructions given to grand jurors in the Southern District of California. *See Navarro-Vargas II*, 408 F.3d 1184. While the Ninth Circuit has thus far (narrowly) rejected such challenges, it has, in the course of adopting a highly formalistic approach[11] to the problems posed by the instructions, endorsed many of the substantive arguments raised by the defendants in those cases. The district court's instructions cannot be reconciled with the role of the grand jury as set forth in *Navarro-Vargas II.*

For instance, with respect to the grand jury's relationship with the prosecution, the *Navarro-Vargas II* majority acknowledges that the two institutions perform similar functions: "'the public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'" *Navarro-Vargas II*, 408 F.3d at 1200 (quoting *Butz v. Economou*, 438 U.S. 478, 510 (1978)). *Accord Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) (The grand jury's discretion in this regard "is most accurately described as prosecutorial."). *See also Navarro-Vargas II*, 408 F.3d at 1213 (Hawkins, J., dissenting). It recognizes that the prosecutor is not obligated to proceed on any indictment or presentment returned by a grand jury, *id.*, but also that "the grand jury has no obligation to prepare a presentment or to return an indictment drafted by the prosecutor." *Id.* *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "'arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights'") (quoting Wayne LaFave et al., *Criminal Procedure* § 15.2(g) (2d ed. 1999)).

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[10] The impanelment instructions go even further. In addressing a prospective grand juror who revealed "a strong bias for the U.S. Attorney, whatever cases they might bring," see Exhibit B at 38, Judge Burns affirmatively endorsed the prospective juror's view of the U.S. Attorney's office, even while purporting to discourage it: "frankly, I agree with the things you are saying. They make sense to me." *See id.* at 43. *See also id.* at 40 ("You were saying that you give a presumption of good faith to the U.S. Attorney and assume, quite logically, that they're not about the business of trying to indict innocent people or people that they believe to be innocent or the evidence doesn't substantiate the charges against.").

[11] *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (criticizing the majority because "[t]he instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence.").

Indeed, the *Navarro-Vargas II* majority agrees that the grand jury possesses all the attributes set forth in *Vasquez v. Hillery*, 474 U.S. 254 (1986). *See id.*

> The grand jury thus determines not only whether probable cause exists, but also whether to "charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense -- all on the basis of the same facts. And, significantly, the grand jury may refuse to return an indictment even "'where a conviction can be obtained.'"

Id. (quoting *Vasquez*, 474 U.S. at 263). The Supreme Court has itself reaffirmed *Vasquez*'s description of the grand jury's attributes in *Campbell v. Louisiana*, 523 U.S. 392 (1998), noting that the grand jury "controls not only the initial decision to indict, but also significant questions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime." *Id.* at 399 (citing *Vasquez*, 474 U.S. at 263).

Judge Hawkins notes that the *Navarro-Vargas II* majority accepts the major premise of *Vasquez*: "the majority agrees that a grand jury has the power to refuse to indict someone even when the prosecutor has established probable cause that this individual has committed a crime." *See id.* at 1214 (Hawkins, J. dissenting). *Accord Navarro-Vargas I*, 367 F.3d at 899 (Kozinski, J., dissenting); *Marcucci*, 299 F.3d at 1166-73 (Hawkins, J., dissenting). In short, the grand jurors' prerogative not to indict enjoys strong support in the Ninth Circuit. But not in Judge Burns' instructions.

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ii. The Instructions Forbid the Exercise of Grand Jury Discretion Established in Both *Vasquez* and *Navarro-Vargas II*.

The *Navarro-Vargas II* majority found that the instruction in that case "leave[s] room for the grand jury to dismiss even if it finds probable cause," 408 F.3d at 1205, adopting the analysis in its previous decision in *Marcucci*. *Marcucci* reasoned that the instructions do not mandate that grand jurors indict upon every finding of probable cause because the term "should" may mean "what is probable or expected." 299 F.3d at 1164 (citation omitted). That reading of the term "should" makes no sense in context, as Judge Hawkins ably pointed out. *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) ("The instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence."). *See also id.* ("The 'word' should is used to express a duty [or] obligation.") (quoting *The Oxford American Diction and Language Guide* 1579 (1999) (brackets in original)).

The debate about what the word "should" means is irrelevant here; the instructions here make no such fine distinction. The grand jury instructions make it painfully clear that grand jurors simply may not choose not to indict in the event of what appears to them to be an unfair application of the law: should "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient'...." *See* Ex. A at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because they disagree with a proposed prosecution. No grand juror would read this language as instructing, or even allowing, him or her to assess "the need to indict." *Vasquez*, 474 U.S. at 264.

Nor does the *Navarro-Vargas II* majority's faith in the structure of the grand jury a cure for the instructions excesses. The *Navarro-Vargas II* majority attributes "[t]he grand jury's discretion -- its independence -- [to] the absolute secrecy of its deliberations and vote and the unreviewability of its decisions." 408 F.3d at 1200. As a result, the majority discounts the effect that a judge's instructions may have on a grand jury because "it is the *structure* of the grand jury process and its *function* that make it independent." *Id.* at 1202 (emphases in the original).

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Judge Hawkins sharply criticized this approach. The majority, he explains, "believes that the 'structure' and 'function' of the grand jury -- particularly the secrecy of the proceedings and unreviewability of many of its decisions -- sufficiently protects that power." *See id.* at 1214 (Hawkins, J., dissenting). The flaw in the majority's analysis is that "[i]nstructing a grand jury that it lacks power to do anything beyond making a probable cause determination ... unconstitutionally undermines the very structural protections that the majority believes save[] the instruction." *Id.* After all, it is an "'almost invariable assumption of the law that jurors follow their instructions.'" *Id.* (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). If that "invariable assumption" were to hold true, then the grand jurors could not possibly fulfill the role described in *Vasquez*. Indeed, "there is something supremely cynical about saying that it is fine to give jurors erroneous instructions because nothing will happen if they disobey them." *Id.*

In setting forth Judge Hawkins' views, Mr. Gastelum understands that this Court may not adopt them solely because the reasoning that supports them is so much more persuasive than the majority's sophistry. Rather, he sets them forth to urge the Court *not to extend* what is already untenable reasoning.

Here, again, the question is not an obscure interpretation of the word "should", but an absolute ban on the right to refuse to indict that directly conflicts with the recognition of that right in *Vasquez*, *Campbell*, and both *Navarro-Vargas II* opinions. *Navarro-Vargas II* is distinguishable on that basis, but not only that.

Judge Burns did not limit himself to denying the grand jurors the power that *Vasquez* plainly states they enjoy. He also apparently excused prospective grand jurors who might have exercised that Fifth Amendment prerogative, excusing "three [jurors] in this case, because they could not adhere to [that] principle...." *See* Ex. A at 8. The structure of the grand jury and the secrecy of its deliberations cannot embolden grand jurors who are no longer there, likely because they expressed their willingness to act as the conscience of the community. *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (a grand jury exercising its powers under *Vasquez* "serves ... to protect the accused from the other branches of government by acting as the 'conscience of the community.'") (quoting *Gaither v. United States*, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969)). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure," *United States v. Williams*, 504 U.S. 36, 50 (1992), and, here, Judge Burns has both fashioned his own rules and enforced them. The instructions here are therefore structural error. *See Navarro-Vargas II*, 408 at 1216-17 (Hawkins, J., dissenting). The indictment must be dismissed.

iii. The Instructions Conflict With *Williams*' Holding that there Is No Duty to Present Exculpatory Evidence to the Grand Jury.

In *Williams*, the defendant, although conceding that it was not required by the Fifth Amendment, argued that the federal courts should exercise their supervisory power to order prosecutors to disclose exculpatory evidence to grand jurors, or, perhaps, to find such disclosure required by Fifth Amendment common law. *See* 504 U.S. at 45, 51. *Williams* held that "as a general matter at least, no such 'supervisory' judicial authority exists." *See id.* at 47. Indeed, although the supervisory power may provide the authority "to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions,'" *id.* at 46 (citation omitted), it does not serve as "a means of *prescribing* such standards of prosecutorial conduct in the first instance." *Id.* at 47 (emphasis added). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure." *Id.* at 50. As a consequence, *Williams* rejected the defendant's claim, both as an exercise of supervisory power and as Fifth Amendment common law. *See id.* at 51-55.

Despite the holding in *Williams*, the instructions here assure the grand jurors that prosecutors would present to them evidence that tended to undercut probable cause. *See* Ex. A at 20.

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.*

Id. (emphasis added). Moreover, the district court later returned to the notion of the prosecutors and their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

This particular instruction has a devastating effect on the grand jury's protective powers, particularly if it is not true. It begins by emphasizing the message that *Navarro-Vargas II* somehow concluded was not conveyed by the previous instruction: "You're all about probable cause." *See* Ex. A at 20. Thus, once again, the grand jury is reminded that they are limited to probable cause determinations (a reminder that was probably unnecessary in light of the fact that Judge Burns had already told the grand jurors that they likely would be excused if they rejected this limitation). The instruction goes on to tell the grand jurors that they should consider evidence that undercuts probable cause, but also advises the grand jurors that the prosecutor will present it. The end result, then, is that grand jurors should consider evidence that goes against probable cause, but, if none is presented by the government, they can presume that there is none. After all, "in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." *See id.* Thus, if the exculpatory evidence existed, it necessarily would have been presented by the "duty-bound" prosecutor, because the grand jurors "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

These instructions create a presumption that, in cases where the prosecutor does not present exculpatory evidence, no exculpatory evidence exists. A grand juror's reasoning, in a case in which no exculpatory evidence was presented, would proceed along these lines:

> (1) I have to consider evidence that undercuts probable cause.
> (2) The candid, honest, duty-bound prosecutor would, in good faith, have presented any such evidence to me, if it existed.
> (3) Because no such evidence was presented to me, I may conclude that there is none.

Even if some exculpatory evidence were presented, a grand juror would necessarily presume that the evidence presented represents the universe of all available exculpatory evidence; if there was more, the duty-bound prosecutor would have presented it.

The instructions therefore discourage investigation–if exculpatory evidence were out there, the prosecutor would present it, so investigation is a waste of time–and provide additional support to every probable cause determination: i.e., this case may be weak, but I know that there is nothing on the other side of the equation because it was not presented. A grand jury so badly misguided is no grand jury at all under the Fifth Amendment.

VIII.

MOTION TO PRODUCE GRAND JURY TRANSCRIPTS

On the off chance this Court denies Mr. Gastelum's motion to dismiss the indeictment due to misinstruction, Mr. Gastelum moves this Court to compel the government to produce all grand jury transcripts in this case. Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) allows disclosure "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Mr. Gastelum explained to agents following his arrest that he had been forced to drive the car the day of his arrest. This fact, if known to the grand jury, seems to fall within the type of information that District Judge Barry T. Moskowitz identified as one in which the:

> "Defendant can establish that the Government in fact knew of exculpatory evidence that was not presented to the grand jury and that this failure to present exculpatory evidence, in conjunction with Judge Burns' comments, "substantially influenced the grand jury's decision to indict" or raises "grave doubt" that the decision to indict was free from the substantial influence of such events," warranting possible dismissal of the indictment.

See United States v. Martinez-Covvarrubias, No. 07cr0491-BTM, Docket No. 30, at pages 11-12, attached as Exhibit B to these motions. Given the tenor of the agents' reports in this case, Mr. Gastelum does not believe this information regarding why he can to be driving the car was proffered by the government when indicting this case.

IX.

MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Mr. Gastelum requests to file further motions if necessary.

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X.

CONCLUSION

Mr. Gastelum requests this Court grant his motions.

Respectfully submitted,

Dated: August 10, 2008

/s/ Robert H. Rexrode

ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

EXHIBIT A

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorneys for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE PETER C. LEWIS)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08mj8509 DATE: June 19, 2008 TIME: 1:30 p.m. **PLACE: United States District Courthouse, El Centro, Ca.** NOTICE OF MOTIONS: (1) TO COMPEL DISCOVERY; (2) TO PRESERVE EVIDENCE; AND, (3) TO INCORPORATE MOTIONS INTO INDICTED CASE.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, CHARLOTTE KAISER, ASSISTANT UNITED STATES ATTORNEY, AND JOHN WEIS, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 19, 2008, at 1:30 p.m., **at the United States District Courthouse in El Centro, California**, or as soon thereafter as counsel may be heard, the defendant, Jose Gastelum, by and through his counsel, Robert Rexrode, will ask this Court to enter an order granting the following motions.

MOTIONS

The defendant, Jose Gastelum, by and through his attorney, Robert Rexrode, pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order:

1) to compel discovery;
2) to preserve evidence; and,
3) to incorporate motions into indicted case.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and all other materials that may come to this Court's attention at the time of the hearing on these motion.

Respectfully submitted,

Dated: June 13, 2008

/s/ Robert H. Rexrode
ROBERT H. REXRODE, III
Attorneys for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorneys for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE PETER C. LEWIS)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08mj8509 STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS.

I.

FACTUAL HISTORY[1]

Agents arrested Mr. Gastelum on June 5, 2008. They did so after using a spike-strip (euphemistically described by agents as a Controlled Tire Deflation Device) to puncture the tires of a car allegedly driven by Mr. Gastelum. Once agents stopped the car, they discovered six undocumented immigrants. Agents chose to retain three of these immigrants. At the request of Mr. Gastelum, the government retained a fourth immigrant from the car.

Mr. Gastelum is now facing charges related to transporting these immigrants. The government intends to seek an indictment on these events and defense counsel expects Mr. Gastelum to arraigned on an indictment at his next court date–June 19, 2008.

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[1]The following facts are based on information provided by the government. Mr. Gastelum does not admit their accuracy and reserves the right to challenge them.

II.

MOTION COMPEL DISCOVERY

The following discovery request is a limited, preliminary request. Recognizing that discovery motions are normally heard in this district by the district judge assigned to a case, Mr. Gastelum has limited his current request to information that may become worthless if not disclosed at this point.

1. Identities and Contact Information of Those in the Car

Mr. Gastelum requests disclosure of the identities and contact information of the three undocumented immigrants involved in this case who were not initially retained as material witnesses by agents. According to the complaint in this case, agents retained three people as material witnesses: Jose Toledo-Corrales, Blanca Morado-Lopez, and Ernesto Martinez-Mosqueda. Also according to the complaint, however, there were three other undocumented immigrants in the car. Defense counsel has reason to believe that the government has retained, at Mr. Gastelum's request, a fourth individual.

Mr. Gastelum requests disclosure of the three as-yet-unidentified immigrants referred to in the compliant. These people are percipient witnesses to the alleged crime committed by Mr. Gastelum and their identities are thus discoverable. *See, e.g.*, *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). Defense counsel also has a good-faith belief that their observations may be material to the preparation of Mr. Gastelum's defense, and thus any documents or data related to these individuals are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Additionally, the government has an affirmative duty to disclose information which exculpates or tends to exculpate Mr. Gastelum. *Brady v. Maryland*, 373 U.S. 83 (1963). And last, as a matter of simple fairness and due process, the government should disclose those people are witnesses to the events that led to Mr. Gastlum's arrest, particularly when Mr. Gastelum does not have the ability to ascertain the identities of these witnesses.

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III.

MOTION TO PRESERVE EVIDENCE

Again, the motion below to preserve evidence is a limited, preliminary request.

1. Material Witnesses

Agents retained three of the six undocumented immigrants involved in this case. Mr. Gastelum has reason to believe the government secured the retention of a fourth individual. Mr. Gastelum requests that this fourth individual be held in the United States, pending his ability to interview this individual. Mr. Gastelum also requests that the remaining two individuals be held in the United States, pending his ability to interview these individuals. For the reasons discussed above in his motion to compel discovery, Mr. Gastelum believes this request a proper one. Recognizing, however, the cost of his request–to both these individuals and the government–Mr. Gastelum will expedite his interviews.

2. Car Allegedly Driven by Mr. Gastelum

Mr. Gastelum requests the government preserve the car allegedly driven by Mr. Gastelum in this case. *See* Fed. R. Crim. P. (a)(1)(E)(i).

3. Border Patrol Cars Involved in Arrest

Mr. Gastelum acknowledges this is an odd request. Nonetheless, defense counsel has a good-faith belief that the condition of the Border Patrol cars involved in Mr. Gastelum's arrest will be material to Mr. Gastelum's defense. They are thus discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Not wanting to seem unreasonable, however, Mr. Gastelum merely requests the opportunity to inspect and photograph the *exterior* of these cars *in the same condition* as they were following Mr. Gastelum's arrest. He therefore requests an order preserving these cars in the condition they appeared following Mr. Gastelum's arrest. Mr. Gastelum will expedite his inspection and photography to limit any inconvenience to the Border Patrol.

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4. Law Enforcement Communications Related to the Arrest

Mr. Gastelum requests preservation of any recorded communications between agents as they relate to Mr. Gastelum's arrest on June 5, 2008. Defense counsel has a good-faith belief that these communications may be material to the preparation of Mr. Gastelum's defense, and thus are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Recognizing, however, that this case is in its early stages, at this point, Mr. Gastelum is simply requesting the preservation of these recorded communications.

IV.

MOTION TO INCORPORATE MOTIONS INTO INDICTED CASE

The government intends to seek an indictment on these events and defense counsel expects Mr. Gastelum to arraigned on an indictment at his next court date–June 19, 2008. If this turns out to be the case, Mr. Gastelum requests that the above motions be incorporated into that indicted case.

V.

CONCLUSION

Mr. Gastelum requests this Court grant his motions.

Respectfully submitted,

Dated: June 13, 2008

/s/ Robert H. Rexrode
ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE PETER C. LEWIS)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08mj8509 PROOF OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served via CM/ECF and email this day upon:

Charlotte Kaiser, Assistant United States Attorney
charlotte.kaiser@usdoj.gov
John Weis, Assistant United States Attorney
john.weis@usdoj.gov

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: June 13, 2008

ROBERT H. REXRODE, III
Attorney for Defendant
robert_rexrode@rexrodelawoffices.com

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL MARTINEZ-COVARRUBIAS,

Defendant.

CASE NO. 07cr0491 BTM

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant Manuel Martinez-Covarrubias has filed a Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's motion is **DENIED**.

I. BACKGROUND

On February 28, 2007, a federal grand jury empaneled in this district on January 11, 2007 returned a two-count Indictment charging Defendant with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).

II. CHALLENGED INSTRUCTIONS

A. Video Presentation

Prior to the selection of the grand jury jury, the potential grand jurors were shown a video titled "The Federal Grand Jury: The People's Panel." The video's apparent purpose is to educate potential grand jurors about their civic duty to serve, the function of the grand jury, and their responsibilities as grand jurors.

The video presents the story of a woman who serves on a grand jury for the first time. In one scene, after the woman receives the summons, her son tells her what he has learned about the function of a grand jury. Reading from a civics book, the son states that if the "jury finds that probable cause does exist, then it will return a written statement of charges called an indictment . . . ."

When charging the impaneled grand jury, the fictional judge explains that if the grand jury finds that there is probable cause, "you will return an indictment."

Later, the foreperson tells the other grand jurors that there are two purposes of the grand jury: (1) when there is a finding of probable cause, to bring the accused to trial fairly and swiftly; and (2) to protect the innocent against unfounded prosecution.

B. Voir Dire Session

Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns, explained the function of the grand jury to the prospective jurors as follows: "The grand jury is determining really two factors: 'Do we have a reasonable – collectively, do we have a reasonable belief that a crime was committed? And second, do we have a reasonable belief that the person that they propose that we indict committed the crime?' If the answer is 'yes' to both of those, then the case should move forward. If the answer to either of the questions is 'no,' then the grand jury should hesitate and not indict." App. 2 to Gov't Response at 8.

During voir dire, Judge Burns explained to the potential grand jurors that the presentation of the evidence to the grand jury was going to be one-sided. Id. at 14. However, Judge Burns stated, "Now, having told you that, my experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that." Id. at 14-15.

One prospective juror, a retired clinical social worker, indicated that he did not believe that any drugs should be considered illegal. Id. at 16. He also stated that he had strong feelings about immigration cases and thought the government was spending a lot of time unnecessarily persecuting people. Id. The following exchange occurred:

> The Court: Now, the question is can you fairly evaluate those cases? Just as the Defendant ultimately is entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. I wouldn't want you to say, "Well, yeah, there's probable cause. But I still don't like what our Government is doing. I disagree with these laws, so I"m not going to vote for it to go forward." If that's your frame of mind, then probably you shouldn't serve. Only you can tell me that.
>
> Prospective Juror: Well, I think I may fall in that category.
>
> The Court: In the latter category?
>
> Prospective Juror: Yes.
>
> The Court: Where it would be difficult for you to support a charge even if you thought the evidence warranted it?
>
> Prospective Juror: Yes.
>
> The Court: I'm going to excuse you, then. I appreciate your honest answers.

Id. at 16-17.

Later, another prospective juror, a real estate agent, expressed a concern regarding the disparity between state and federal law with respect to medical marijuana. Judge Burns responded:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision and look at the facts and make a determination of whether there was a [sic] probable cause.

Id. at 25.

Subsequently, the prospective juror stated that he felt that drugs should be legal and that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The following exchange ensued:

> The Court: I think rapists and murderers ought to go to jail too. It's not for me as a judge to say what the law is. We elect legislators to do that. We're sort of at the end of the pipe on that. We're charged with enforcing the laws that Congress gives us.
>
> I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar obligation as a grand juror even though you might

> have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. Your prerogative instead is to act like a judge and to say, "All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." And then your obligation, if you find those things to be true, would be to vote in favor of the case going forward.
>
> I can understand if you tell me, "Look, I get all that, but I just can't do it or I wouldn't do it." I don't know what your frame of mind is. You have to tell me about that.
>
> Prospective Juror: I'm not comfortable with it.
>
> The Court: Do you think you'd be inclined to let people go on drug cases even though you were convinced there was probable cause they committed a drug offense?
>
> Prospective Juror: It would depend upon the case.
>
> The Court: Is there a chance that you would do that?
>
> Prospective Juror: Yes.
>
> The Court: I appreciate your answers. I'll excuse you at this time.

Id. at 26-28.

Later, a potential juror said that he was "soft" on immigration because he had done volunteer work with immigrants in the field, but that he could be fair and objective. Judge Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're not about trying to change people's philosophies and attitudes here. That's not my business. But what I have to insist on is that you follow the law that's given to us by the United States Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

C. Charge to Impaneled Grand Jury

After the grand jury was impaneled, Judge Burns gave further instructions regarding the responsibilities of the grand jurors.

With respect to the enforcement of federal laws, Judge Burns explained:

> But it's not for you to judge the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity is [sic] criminal is not up to you. That's a judgment that Congress makes.
>
> And if you disagree with that judgment made by Congress, then your

> option is not to say, 'Well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment] even though the evidence may be insufficient.' Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.
>
> Furthermore, when you're deciding whether to indict or not to indict, you shouldn't be concerned with punishment that attaches to the charge. I think I also alluded to this in the conversation with one gentleman. Judges alone determine punishment. We tell trial juries in criminal cases that they're not to be concerned with the matter of punishment either. Your obligation at the end of the day is to make a business-like decision on facts and apply those facts to the law as it's explained and read to you.

App. 1 to Gov't Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns said, "If past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you." Id. at 27.

III. DISCUSSION

A. Instructions Re: Role of Grand Jury

Defendant contends that statements made in the video, Judge Burns' instructions, and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the video presentation and the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity.* Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408

F.3d 1184 (9th Cir. 2005) ("Navarro-Vargas II"), the Ninth Circuit upheld the model grand jury instruction that states: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you." The majority opinion observed that the instruction was not contrary to any long-standing historical practice surrounding the grand jury and noted that shortly after the adoption of the Bill of Rights, federal judges charged grand juries with a duty to submit to the law and to strictly enforce it. Id. at 1193,1202-03. "We cannot say that the grand jury's power to judge the wisdom of the laws is so firmly established that the district court must either instruct the jury on its power to nullify the laws or remain silent." Id. at 1204.

A prohibition against judging the wisdom of the criminal laws enacted by Congress amounts to the same thing as a prohibition against refusing to indict based on disagreement with the laws. It is true that Judge Burns used stronger language that, viewed in isolation, could be misconstrued as requiring the return of an indictment in *all* cases where probable cause can be found. Particularly troubling is the following statement made to the real estate agent: "Your prerogative instead is to act like a judge and to say, 'All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does.' *And then your obligation*, if you find those things to be true, *would be to vote in favor of the case going forward*." App. 2 to Gov't Response at 26. However, viewed in context, Judge Burns was not mandating the issuance of an indictment in *all* cases where probable cause is found; he was explaining that disagreement with the laws should not be an obstacle to the issuance of an indictment.[1]

Furthermore, the word "obligation" is not materially different than the word "should."

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[1] The Supreme Court has recognized that a grand jury is not required to indict in every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986), the Supreme Court explained: "The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)."

In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors "should" indict if they find probable cause does not violate the grand jury's independence. The majority explained, "As a matter of pure semantics, it does not 'eliminate discretion on the part of the grand jurors,' leaving room for the grand jury to dismiss even if it finds probable cause." Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word "should" is used "to express a duty [or] *obligation*." Id. at 1121 (quoting The Oxford American Diction And Language Guide 931 (1999))(emphasis added).[2]

Defendant points to the language in the video where first the son, then the judge, state that if there is a finding of probable cause, the grand jury "will" return an indictment. However, no emphasis is placed on the word "will." As spoken by the actors, the statements are not directives, mandating the return of an indictment upon the finding of probable cause, but, rather, descriptions of what is expected to occur. Similarly, the foreperson's statement that one of the purposes of the grand jury is to bring an accused to trial when there is a finding of probable cause is a general statement of the grand jury's function, not a command to return an indictment in *every* case where probable cause exists.

Defendant also argues that Judge Burns improperly forbade the grand jury from considering the potential punishment for crimes when deciding whether or not to indict. Defendant relies on the following statement:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. *We'd ask you to also abide by that.* We want you to make a business-like decision and look at the facts and make a determination of whether there was a probable cause.

App. 2 to Gov't Response at 25. (Emphasis added.) Although Judge Burns stated that trial jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors. Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly, during the formal charge, Judge Burns stated, "[y]ou *shouldn't* be concerned with punishment that attaches to the charge." App. 1 to Gov't Response at 8. (Emphasis added.)

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[2] Defendant concedes that at other times Judge Burns instructed that upon a finding of probable cause, the case "should" go forward. App. 2 to Gov't Response at 8, 17; App. 1 to Gov't Response at 4, 23.

In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit upheld a jury instruction that stated: "[W]hen deciding whether or not to indict, you *should not* be concerned about punishment in the event of conviction; judges alone determine punishment." (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on considering punishment and was therefore constitutional. The instructions given by Judge Burns regarding the consideration of punishment were substantially the same as the instruction in Cortez-Rivera.

Neither Judge Burns nor the video pronounced a general prohibition against jurors exercising their discretion to refuse to return an indictment in the face of probable cause. In any case, "history demonstrates that grand juries do not derive their independence from a judge's instruction. Instead they derive their independence from an unreviewable power to decide whether to indict or not." Navarro-Vargas II, 408 F.3d at 1204.

Both the video and Judge Burns informed the jurors about the utmost secrecy of the grand jury proceedings and their deliberations. The video and Judge Burns also emphasized to the jury that they were independent of the Government and did not have to return an indictment just because the Assistant U.S. Attorney asked them to. In the video, the judge expressed approval at the fact that the grand jury did not return an indictment as to the alleged driver of the get-away car. Judge Burns characterized the jury as "a buffer between our Government's ability to accuse someone of a crime and then putting that person through the burden of standing trial." App. 1 to Gov't Response at 26. Judge Burns also told the jurors that they were not to be a "rubber stamp" and were expected to depend on their independent judgment. Id. at 27.

Even though the jurors were not explicitly instructed that they could use their discretion to refuse to return an indictment, they retained that power by virtue of the secrecy surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge

Burns said or did impinged on the jurors' independence in this regard.

Defendant counters that the dismissal of the two potential jurors undermined the grand jury's independence from the very start. According to Defendant, when Judge Burns dismissed the jurors, the message was clear that they were to indict in every case where there was probable cause or they would be excused. Defendant contends that the remaining grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br. 18.) The Court disagrees.

Upon reading the voir dire transcript, it is apparent that the jurors were excused because they were biased against the government with respect to a whole category of criminal laws, not simply because they were independent-minded and might refuse to return an indictment in a case where probable cause exists. Judge Burns explained to the clinical social worker, "We're all products of our experience. We're not going to try to disabuse you of experiences or judgments that you have. What we ask is that you not allow those to control invariably the outcome of the cases coming in front of you; that you look at the cases fresh, you evaluate the circumstances, listen to the witness testimony, and then make an independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social worker after he admitted that it would be difficult for him to return an indictment in drug or immigration cases.

Similarly, the real estate agent expressed that he thought drugs should be legal and that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The real estate agent said that he was not comfortable with indicting in drug cases. Although he did not say that he would refuse to indict in all cases involving drugs, he admitted that because of his beliefs, there was a chance that he would refuse to return an indictment in a drug case even though there was probable cause. Id. at 27. The real estate agent's responses established that he had serious concerns regarding the criminalization of drugs and could not be impartial with respect to these cases

That bias was the reason for the dismissal of the first two potential jurors is confirmed by the dismissal of a third potential juror. This juror stated that he had a strong bias for the

Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he should not "automatically defer to [the Government] or surrender the function and give the indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40. Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of each case independently based on the evidence presented. Id. at 42-43. Demonstrating his even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I wouldn't want you to do that." Id. at 44.

A reasonable grand juror would not have interpreted the dismissal of the first two potential jurors as a message that they must indict in all cases where probable cause is found or risk being excused from service. It was apparent to the other jurors that a lack of impartiality with respect to certain types of cases, *not* independence, was the reason for all three dismissals.

In sum, Judge Burns did not err in instructing the grand jurors that they were not to refuse to return an indictment on the ground that they disagreed with the laws. Furthermore, nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II, 408 F.3d at 1204, the grand jury's independence results from the secrecy of their deliberations and the unreviewability of their decisions. Nothing in the record shows any impediment to that independence.

B. Instructions re: Assistant U.S. Attorneys

Defendant also contends that Judge Burns committed structural error by making comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the charge." According to Defendant, not only did Judge Burns' comments contradict United States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation, leading to inaccurate probable cause determinations. Defendant reasons that given Judge Burns' comments, the grand jurors would have assumed that if the prosecutor did not present any exculpatory evidence, then none exists, rendering further investigation a waste of time.

Under Williams, prosecutors do not have a duty to present substantial exculpatory evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an employment duty to disclose "substantial evidence that directly negates the guilt" of a subject of investigation (United States Attorneys' Manual § 9-11.233), it does not appear that they have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to the Government's position.

Accordingly, Judge Burns' comments regarding the duty of Assistant U.S. Attorneys to present adverse evidence were inaccurate. However, Judge Burns' comments do not rise to the level of structural error. As discussed above, the video and Judge Burns stressed that the grand jury was independent of the Government. The video and Judge Burns also explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional documents or witnesses. App. 1 to Gov't Response at 11, 24. The jurors were also told about their right to pursue their own investigation, even if the Assistant U.S. Attorney disagrees with the grand jury's decision to pursue the subject. Id. at 12.

In light of the foregoing instructions, the Court does not agree that the grand jurors would assume that if the Government did not present any exculpatory evidence, none exists. A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of certain exculpatory evidence, whether due to legitimate circumstances or inadequate investigation, and that further investigation by the grand jury may be needed to properly evaluate the evidence before them. Furthermore, Judge Burns told the jury that "in *most* instances" the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to Gov't Response at 20. Based on this qualifying language, the grand jurors would have understood that the prosecutor is not always bound to present exculpatory evidence. Thus, "the structural protections of the grand jury" have not "been so compromised as to render the proceedings fundamentally unfair." Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988).

If Defendant can establish that the Government in fact knew of exculpatory evidence that was not presented to the grand jury and that this failure to present exculpatory evidence, in conjunction with Judge Burns' comments, "substantially influenced the grand jury's decision to indict" or raises "grave doubt" that the decision to indict was free from the substantial influence of such events, the Court may dismiss the indictment under its supervisory powers. Bank of Nova Scotia, 487 U.S. at 256. Therefore, the Court will grant Defendant leave to conduct discovery regarding what evidence was presented to the grand jury. If, based upon the discovery, Defendant can establish that he suffered actual prejudice, Defendant may renew his motion to dismiss the indictment.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction is **DENIED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

DATED: October 11, 2007

Barry Ted Moskowitz

Honorable Barry Ted Moskowitz
United States District Judge

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE JANIS L. SAMMARTINO**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08cr2032-JLS PROOF OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served via CM/ECF and email this day upon:

Charlotte Kaiser, Assistant United States Attorney
charlotte.kaiser@usdoj.gov

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: August 10, 2008

ROBERT H. REXRODE, III
Attorney for Defendant
robert_rexrode@rexrodelawoffices.com